APPENDIX A

Opinions Below

Opinion of Court

(Filed May 19, 1967)

(378 F. 2d 612)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee,

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Edward S. Northrop, District Judge.

(Argued March 6, 1967. Decided May 19, 1967.)

Before Boreman, Bryan and Craven, Circuit Judges.

Norman P. Ramsey (Thomas Waxter, Jr., and H. Thomas Howell on brief) for Appellant, and Ronald T. Osborn,

Assistant United States Attorney, (Thomas J. Kenney, United States Attorney, Arthur K. Crocker and Clarence E. Goetz, Assistant United States Attorneys, on brief) for Appellee.

CRAVEN, Circuit Judge:

Graziano Mancuso was convicted by a jury of attempting to evade income taxes for the years 1956 through 1960.[1] In this appeal he attacks his conviction on two broad grounds: (1) insufficiency of the Government's case based on the net worth method of proof, and (2) misconduct of Government agents amounting to a denial of his Sixth Amendment right to the effective assistance of counsel, his Fifth Amendment right not to incriminate himself, and his Fourth Amendment right to be secure from unreasonable search and seizure.

I.

The evidence was amply sufficient for the jury to have found that the defendant had been since 1945 the dominant member of a family partnership, V. Mancuso & Sons, a barber supply business in Baltimore; that the defendant's brother, Nicholas, was also a partner, and his son, Vincent, Jr., became a partner in 1958; and that the defendant's father, Vincent Sr., who was described as a "limited partner" from 1945 until 1958, when he retired from the business, was salaried during this time and did not share in the profits. The defendant testified that ninety-eight percent of all partnership receipts were in cash.

The Government's comparative net worth analysis of the defendant showed an increase in personal net worth over the five years for which prosecution was undertaken of approximately $63,000, of which some $52,000 was shown as

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[1] He was indicted and convicted on five separate counts under § 7201 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7201, and was sentenced to one hundred and eighty-three days imprisonment.

derived from unreported taxable income.[2] The consistent increases in the defendant's personal net worth were attributed by the Government almost exclusively to income from the family partnership.

The Government ascribed $19,000 of the growth in the defendant's net worth over the five year period to increases in the value of his share of the partnership capital. The Government's personal net worth analysis on the defendant included in each year as one asset an apportioned share of the then current partnership capital.[3]

The defendant maintains that there was a complete lack of evidence to support the Government net worth schedules which were therefore improperly admitted in evidence, and thus his case was erroneously permitted to go to the jury. The challenge to the Government's proof relates specifically to determination of his interest in the partnership capital and its use in calculating his personal net worth. Other assets (and expenditures) in the Government per-

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[2] The Government's comparative net worth schedule for the defendant showed the following:

Date	*Defendant's Share of Partnership Net Worth (capital)*	*Total Personal Net Worth (Assets less liabilities and depreciation)*	*Increase in Personal Net Worth During Year*	*Understated Taxable Income*
12/31/53	$26,130.	$83,655.		
12/31/54	30,371.	90,922.	$ 7,267.	$ 6,535.
12/31/55	32,581.	101,578.	10,657.	10,298.
12/31/56	38,393.	113,141.	11,563.	9,735.
12/31/57	42,759.	144,531.	31,390.	26,108.
12/31/58	47,393.	153,743.	9,212.	10,036.
12/31/59	48,342.	157,132.	3,389.	4,177.
12/31/60	50,511.	164,437.	7,305.	2,022.

Note: Figures have been rounded off to the nearest whole number.

In calculating the defendant's taxable income in a given year, the Government in its net worth schedule adjusted the increase in his personal net worth by adding expenditures which do not result in asset accumulation (*e.g.*, daily living expenses and purchases of gifts for other persons) and subtracting, *inter alia*, the defendant's personal exemptions and the standard deduction.

[3] See note 2 *supra*.

sonal net worth schedule were based on direct evidence introduced at trial.

The defendant concedes that amounts assigned by the Government to business assets, liabilities, and depreciation reserve in constructing a comparative net worth statement for the family partnership were proved by competent evidence at his trial.[4] He contends, however, that key "assumptions" made by the Government in establishing his share in the partnership capital are unsupported by direct evidence.

The Government's theory allocated to the defendant and Nicholas Mancuso each one-half of the partnership capital on December 31, 1953, the starting point in its net worth schedules. Thereafter they were credited with an even one-half of the increments in partnership capital until the addition of Vincent, Jr. in 1958, after which one-third was allotted to each. However, the Government analysis did not assign to Vincent, Jr. any part of the accumulated firm capital. Although the family business began as Vincent, Sr.'s proprietorship, the Government theory does not allow him an interest in the firm capital during the prosecution period.

The jury accepted the Government's theory and, we think, was entitled to do so. It is true that there was a scarcity of direct evidence relating to the ownership interests in the partnership capital. All the evidence was to the effect that there was no capital account as such, and the partnership tax returns did not include a capital account reconciliation.[5] However, circumstantial evidence was plainly sufficient to support the Government's inferences.

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[4] The Government prepared a comparative net worth statement on the partnership from which was determined the figure listed as "Partner's Share in V. Mancuso & Sons" (termed "Defendant's Share of Partnership Net Worth" in note 2 *supra*) among the assets in the Government's personal net worth schedule on the defendant. The Government's partnership statement, however, computed partnership capital solely from assets and liabilities at the end of the tax years in question and did not include an examination of capital contributions and withdrawals, if any.

[5] The defendant himself testified at trial that there was no capital account. He also testified that he told Government agents that there

The Government's position that Vincent, Sr. was without a capital interest in the prosecution years is strongly supported by evidence at trial. The partnership tax returns for the years under examination show that he was salaried and did not receive a part of the partnership profits. Furthermore, Internal Revenue Agent Gordon testified that he had an "absolute disclaimer" from the defendant of any interest of his father, Vincent, Sr., in the partnership. Agent Gordon further testified that the defendant had told him that beginning in 1945 Vincent, Sr. had "gradually relinquished and he turned [the partnership over] to the two . . ." sons and that Vincent, Sr. remained a "limited partner" and received a salary for little things he did about the place.

The inference that Vincent, Jr. did not acquire any part of the accumulated firm capital on acceptance as a partner in 1958 rests on testimony of Agent Gordon that Vincent, Jr. had told him that he brought nothing into the partnership. This was not denied by the defendant.

There was more than sufficient evidence at trial showing the defendant's dominance of the business for the jury to infer that he had at least an even one-half interest in the partnership capital in 1953 and that he owned an equal part of annual increments in firm capital. So comprehensive was the defendant's control over affairs of the family business, especially the financial ones, a reasonable inference would have been that the partnership-in-name was in fact his sole proprietorship. The defendant was proved to be the only active partner who could and did write checks on the business checking account and who could draw on the partnership savings account.[6] The defendant testified that he alone

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was "just a family arrangement". Internal Revenue Agent Gordon testified that "[a]ll we were able to learn from the whole partnership, all the members, was that they maintained no capital account."

[6] Both business accounts, records of which were introduced in evidence by the Government, are in the joint names of Vincent, Sr. and the defendant. However, the defendant testified that he was the only one who wrote checks and Agent Gordon testified that the defendant told him that Vincent, Sr.'s name had been placed on the savings account, "although he was no longer truly a partner, and it was not the father's money, . . . out of respect, so that in the event anything happened to . . . Graziano Mancuso, the father could be expected to see that everyone was taken care of."

maintained the partnership books and records. He did not account to other members of the firm.[7]

Granting to defendant the benefit of any doubt, the Government attributed to him on its net worth theory only an equal part of the initial partnership capital and increases in net worth. The apportionment made by the Government followed the distribution of profits as reported on the partnership tax returns which were in evidence, and as stated in testimony by Agent Gordon, conformed to the ordinary legal presumption that in absence of evidence of an agreement to the contrary the partners' interests are equal.[8]

The defendant's principal defense was the familiar cash hoard and gift explanation. He admitted on the witness stand that the immediate source of the funds which inflated his personal bank accounts and paid for physical assets appearing on the Government net worth schedule during the years 1953 through 1960 was the partnership checking account. However, he maintained that the money withdrawn for these purposes did not represent partnership profits but were funds placed in the business accounts for convenience and actually derived from funds acquired before the prosecution period or received as gifts from members of his family.[9]

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[7] Agent Gordon testified that the defendant told him that "he maintained the books and records, he was the only one who could write checks and he generally ran the business, in his words. He prepared all returns for the business, except the state and federal income tax returns and the partnership returns, which were prepared by . . ." a CPA from his records.

[8] See Uniform Partnership Act § 18: 68 C.J.S. *Partnership* § 85(b), at 526-27 (1950).

[9] The defendant, for example, testified that he received from his father during the prosecution years some $9,000, which was placed in the partnership checking account. He also testified that his wife had received a large sum of money — around $20,000. — from her mother which was turned over to him from time to time and eventually found its way to the business checking account, and from there into the purchase price of a home.

The following dialogue occurred at the close of the defendant's testimony:

> *The District Judge:* "And you say that most of the money that we are concerned with here came either from your father or your in-laws, is that right?"
>
> *The Defendant:* "Yes, Your Honor."

Inconsistently and in contrast to the position taken by his client, the defendant's counsel advanced the theory at trial and before this court that the Government had not refuted the possibility that the personal assets of his client could have been acquired with partnership capital which had accumulated to his credit before the starting point in the net worth analysis, December 31, 1953. The Government in fact concedes[10] that the defendant would *not* be delinquent in reporting income if it is presumed that in 1953 he owned the entire partnership capital and thereafter when taking funds from the partnership account to enhance his personal asset position drew only on his accumulated capital and took no partnership profits in excess of those reported on his tax return. This was the theoretical possibility illustrated by a hypothetical net worth schedule used by counsel for the defense at trial. Such a possibility appears to be controverted, however, by the defendant's own explanation of asset accumulation. Suffice it to say that the jury — within its competence — accepted neither defense theory.

Because of the omission of the defendant to maintain adequate records the Government was forced to proceed in its prosecution with the net worth method of proof. Its case, therefore, was necessarily grounded in circumstantial evidence. The jury considered the evidence bearing upon the defendant's partnership interest along with the evidence of other assets and purchases, and weighing the defense theories, made the ultimate inference, with which it was satisfied beyond a reasonable doubt, that during the years covered by the indictment the defendant had received substantially greater income than he reported on his tax returns.

What this court said in *Moore v. United States* is pertinent:

> "If [circumstantial evidence] be sufficient to support an inference of guilt and the defendant fails to offer a reasonable explanation consistent with innocence, such failure may be considered by the trier of fact. It is not necessary, in appraising the sufficiency of the evidence,

[10] The concession was made in oral argument before this court.

> that this court be convinced beyond a reasonable doubt of the guilt of the defendant. The question is whether the evidence, construed most favorably for the prosecution, is such that a jury (or trial judge) might find the defendant guilty beyond a reasonable doubt." 271 F. 2d 564, at 568 (4th Cir. 1959) (case citations omitted).

We stated in *Bell v. United States* that [a]n estimate of the taxpayer's net worth as the means of determining his income is resorted to in the absence of accurate records which it is his duty under statute to make and to preserve, and by its very nature it is an approximation; . . . the absence of proof of the exact amounts of unreported income is not fatal if there is *substantial evidence tending to prove the defendant's guilt beyond a reasonable doubt.* 185 F. 2d 302, 308-09 (4th Cir. 1950) (emphasis added).

We have in our review of this case heeded the Supreme Court's admonition that courts should closely scrutinize use of the net worth method of proof because "it is so fraught with danger for the innocent." *Holland v. United States,* 348 U.S. 121, 125 (1955). We have examined the district court's charge and find it especially clear and inclusive of all the elements set out in *Holland,* 348 U.S. at 129. We conclude that the Government established with sufficient certainty the defendant's opening net worth. See *Holland v. United States,* 348 U.S. at 132.

In addition, the Government in the present case tracked "down relevant leads furnished by [the defendant] — leads reasonably susceptible of being checked, which if true would establish his innocence." *Holland v. United States,* 348 U.S. at 135-36. There was plentiful evidence supporting the inference that the defendant's net worth increases were "attributable to currently taxable income." *Holland v. United States,* 348 U.S. at 137.

There was sufficient independent evidence, in addition to the defendant's own statements, for the jury to find that the Government had established the elements of its case beyond a reasonable doubt, including the element of willfulness which was the compelling inference from the consistent pattern of underreporting. See *Smith v. United States,* 348 U.S. 147 (1954).

II.

The defendant's contention that he was denied Fourth, Fifth, and Sixth Amendment rights is based in large part on the conduct of an Assistant United States Attorney in examining and copying certain defense files. Contemplating using as a witness Milton Duke, C.P.A., who had prepared defendant's tax returns for many years, Government counsel interviewed him on more than one occasion. On September 7 or 8, 1965, Duke came alone and willingly to the United States Attorney's office and brought his file on defendant. He voluntarily disclosed it to the Assistant United States Attorney and Internal Revenue agents. Included were net worth schedules prepared at the request of defendant's counsel. The file also contained letters to Duke from defendant's counsel which Agent Gordon said the Government "studiously avoided looking at. . . ."

The Government agents made copies of the defense net worth schedules and compared them with their projected ones. The matter was not kept secret. Defense counsel was promptly and fully advised of the occurrence, and as promptly responded with a motion to suppress. At a two-day hearing on the motion, the district court heard evidence and sensibly considered alternative remedies:

(a) evening things up by requiring the Government to produce *its* net worth statement;

(b) suppressing the physical evidence obtained from Duke and any of its fruits;

(c) dismissal of the indictment — urged by defense counsel to be the only adequate remedy.

The district judge rightly concluded that sufficient protection would be afforded defendant short of a dismissal that would end the cause and exculpate the defendant. He ordered that "the net worth statements and all related papers, whether incriminatory or not, prepared by Mr. Duke at the direction of [defendant's counsel] and for [his] use in the defense of [the defendant], are ordered suppressed as is any evidence that might have been revealed

by those papers." The defense was given the right to object during the trial to any evidence it felt the Government obtained from the documents. The district court, in addition, granted the motion for production of the *Government* net worth schedules. Moreover, the court ordered a continuance for at least sixty days to give defendant's counsel an opportunity to acquire a new accountant.[11]

We need not consider the underlying questions of whether the schedules copied were in fact counsel's work product, and if so, privileged, or whether there was a waiver. Clearly, any prejudice resulting from an assumed violation of the Fourth or Fifth Amendments was cured by the extraordinary remedial order of the district court. "[N]umerous precedents ordering the exclusion of . . . illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book." *United States v. Blue,* 16 L. Ed. 2d 510, 515 (1966). Moreover, the Supreme Court has never "expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing[12] will not reveal it." *Hoffa v. United States,* 17 L. Ed. 2d 374, 382 (1966).

The defendant next complains that he was denied his Sixth Amendment right to the effective representation of counsel by Government use of information gathered in several interviews with Milton Duke in the investigative stage of the proceedings and as a prospective Government witness during preparation for trial. Since an accountant is indispensable to defending a net worth case, it is argued that getting the cooperation of the accountant is the same

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[11] The court also forbade the Government to consult further with Milton Duke. We have no occasion to review the propriety of this unusual sanction since the Government took no exception to it.

[12] The defendant entrusted Duke only with his tax records. He confessed no wrongdoing to Duke, or if he did, his confidence was not breached.

as penetrating the constitutionally protected relationship of attorney-client. We think not. There was here no "surreptitious invasion by a government agent into the legal camp of the defense", nor indeed any "government intrusion" — gross or otherwise — upon the confidential relationship between defendant and his counsel. *Hoffa v. United States*, 17 L. Ed. 2d 374, 384 (1966). The Government engaged in no electronic surveillance, wire tapping, or deception. Compare *Massiah v. United States*, 377 U.S. 201 (1964); *Caldwell v. United States*, 205 F. 2d 879 (D.C. Cir. 1953); *Coplon v. United States*, 191 F. 2d 749 (D.C. Cir. 1951). Certainly on the facts of this case there was no infringement of the Sixth Amendment right to counsel.

Defendant was indicted on April 9, 1963. The district court refused to suppress evidence gathered and statements made to Internal Revenue Service agents at two conferences with the defendant in June and December 1961. Defendant asserts that his right not to be compelled to be a witness against himself was abridged because he was insufficiently warned. The defendant was accompanied by an attorney and his accountant (the same Milton Duke) when he first met with Internal Revenue agents. The uncontroverted testimony by Agent Gordon was that at this meeting he advised the defendant "that under the Constitution of the United States he may refuse to answer any question the answer to which will tend to incriminate him. . . ." We think this more than sufficient.

The defendant was not in custody. He attended the meetings under no compulsion save his own or counsel's judgment that it was in his best interest to do so.

The hearing on the motion for suppression of evidence and the trial in the present case were conducted after the decision of the Supreme Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964), but prior to the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Because of the time sequence, *Escobedo* is more pertinent than *Miranda*. *Johnson v. New Jersey*, 384 U.S. 719 (1966). Though these cases involved state prosecutions and were decided under the Fourteenth Amendment, the principles may apply in federal tax cases.

See S. Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybird,* 76 Yale L.J., 1, 37 (1967).

But *Escobedo* and *Miranda* do not apply to a tax audit, *i.e.,* an investigation by revenue agents of a taxpayer's tax returns and records for the purpose of determining whether or not additional taxes are due and whether or not a crime has in fact been committed. See *Kohatsu v. United States,* 351 F. 2d 898 (9th Cir. 1965). Neither suggest a duty to warn one who, like the defendant, is *not* under arrest and whose freedom of action is not curtailed.

If it be assumed that defendant and his lawyer were unaware of his legal right to resist the investigation, the result is the same. That defendant subjectively may not have known of his rights does not vitiate his voluntary disclosures made with advice of counsel. *United States v. Spomar,* 339 F. 2d 941 (7th Cir. 1965), *cert. denied,* 380 U.S. 975 (1965).

The courts uniformly hold that a taxpayer's ignorance of the nature of an investigation by the Internal Revenue Service and of his legal right to resist "is insufficient ground for suppression of evidence voluntarily given." S. Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybird,* 76 Yale L.J. 1, 36-37 (1966); see, *e.g., Turner v. United States,* 222 F. 2d 926 (4th Cir. 1955).

At the time of these conferences no decision had been made to prosecute. "Explicit warnings need not be given concerning possibilities that may never come to pass." *Greene v. United States,* 296 F. 2d 841, 842 (2d Cir. 1961).

Revenue agents, during the course of an investigation of a taxpayer's returns, and prior to determining upon criminal prosecution, "have no duty to apprise a taxpayer that he need not furnish requested information and that if he does furnish such information it may be used against him in criminal proceedings." *United States v. Spomar,* 339 F. 2d 941, 942 (7th Cir. 1964), and cases cited therein.

Affirmed.

PER CURIAM OPINION OF COURT

(Filed December 8, 1967)

(not yet reported)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee.

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

(Argued October 4, 1967. Decided December 8, 1967.)

Before Haynsworth, Chief Judge, Sobeloff, Boreman, Bryan, Winter, Craven and Butzner, Circuit Judges.

Norman P. Ramsey (Thomas Waxter, Jr., and H. Thomas Howell on brief) for Appellant, and Ronald T. Osborn and Clarence E. Goetz, Assistant United States Attorneys, (Stephen H. Sachs, United States Attorney, on brief) for Appellee.

PER CURIAM:

Upon rehearing en banc the opinion of the panel as reported in 378 F. 2d 612 is adopted as that of the court. To that opinion we append the following:

> After the remedial action taken by the district judge, we are satisfied that the record does not disclose, under the rules laid down in *United States v. Blue*, 384 U.S. 251 (1966), and *Hoffa v. United States*, 385 U.S. 293, *rehearing denied* 386 U.S. 951 (1967), such substantial prejudice to the defendant's Fourth, Fifth, and Sixth Amendment rights that it is appropriate to quash the prosecution and discharge the defendant as a matter of constitutional right. But that is not necessarily the end of the matter.
>
> The government sent for and interviewed defendant's accountant, itself a proper procedure, and made legitimate inquiry concerning his knowledge of defendant's tax returns for the prosecution years. But the government did more. Whether at its instance, or by the voluntary act of the accountant, the government availed itself of the accountant's entire file, *including the accountant's communications with counsel and work papers concerning the preparation of a defense.* The government gave notice to defendant's counsel of what was done, but only after it was done.
>
> In argument, the government expressly disclaimed wrongful intent in what it did, and candidly admitted an extreme, even stupid, error of judgment. The government's deficiencies in the proper conduct of this prosecution were not erased by notice to counsel of what was done, after it was done. Nevertheless, we are persuaded that in this case wrongful intent was absent. Except for such absence and the lack of substantial prejudice, we would dismiss the prosecution and discharge the defendant under our supervisory power over the district courts of this circuit.

APPENDIX B

The Judgment and Orders Below

Order Staying Mandate Pending Timely Filing of Petition for Rehearing

(Filed May 29, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee.

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

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Upon the motion of the appellant by his counsel, and for cause shown,

It is ordered that the time within which the appellant may file a petition for rehearing be, and it is hereby, extended to and including June 5, 1967.

Further ordered that the mandate be, and it is hereby, stayed pending the timely filing of the petition for rehearing.

Herbert S. Boreman,
United States Circuit Judge.

A true copy,
Teste:

Maurice S. Dean,
Clerk, U. S. Court of Appeals
for the Fourth Circuit.

ORDER GRANTING PETITION FOR REHEARING EN BANC

(Filed June 23, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,
Appellee,

v.

Graziano J. Mancuso,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

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Upon consideration of the petition of the appellant for rehearing en banc, and for cause shown,

It is ordered that the appellant's petition be, and it is hereby, granted and the case set down for rehearing at the October session of this Court.

Leave is hereby granted to the respective parties for filing supplemental briefs if so desired provided the supplemental brief of the appellant be filed in the Clerk's office on or before August 11, 1967, and the supplemental brief of the appellee be filed in the Clerk's office on or before September 11, 1967.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

A true copy,
Teste:

MAURICE S. DEAN,
Clerk, U. S. Court of Appeals
for the Fourth Circuit.

Order Affirming Judgment of Conviction

(December 8, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee.

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

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Upon rehearing en banc,

It is ordered that the opinion heretofore filed and reported in 378 F. 2d 612 be supplemented by an addendum as contained in the opinion filed herein this date.

It is further ordered that the judgment of conviction be, and it hereby is, affirmed.

J. Braxton Craven, Jr.,
United States Circuit Judge.

A true copy,
Teste:

Margaret L. Davis,
Chief Deputy Clerk,
U. S. Court of Appeals for
the Fourth Circuit.

ORDER STAYING ISSUANCE OF CERTIFIED COPY OF JUDGMENT IN LIEU OF MANDATE PENDING TIMELY APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

(Filed December 18, 1967)

United States Court of Appeals
For The Fourth Circuit

No. 10,822

United States of America,

Appellee,

v.

Graziano J. Mancuso,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore

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Upon the motion of the appellant by his counsel, and for cause shown,

It is ordered that the issuance of a certified copy of the judgment in lieu of a mandate be, and is hereby, stayed pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application is filed in the said Supreme Court within the time prescribed by law.

CLEMENT F. HAYNSWORTH, JR.,
Chief Judge, Fourth Circuit.

A true copy,
Teste:

MARGARET L. DAVIS,
Chief Deputy Clerk,
U. S. Court of Appeals for
the Fourth Circuit.

APPENDIX C

Oral Opinion of The District Court

Oral opinion of the United States District Court for the District of Maryland, rendered on October 21, 1965, by the Honorable Edward S. Northrop, District Judge. The opinion is unreported.

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(33) Proceedings of October 21, 1965

* * * * * *

(33)

OPINION OF COURT ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND TO DISMISS THE INDICTMENT

All right, let me say at the beginning that the problems raised by virtue of the Government's acquiring these papers, which were the work product of the defense, the taxpayer, cannot be condoned by this Court and it did raise a problem, of course, which necessitated this lengthy hearing and this adjournment to reappraise the situation and submission of briefs on the part of the Government and of the taxpayer. It certainly is fortunate that this does not occur very often and that it is a rare case from that standpoint.

Now, I am going to discuss the motion, first of all, I will direct my attention to the statutory argument concerning Section 7605 (b). I think the Petitioner's argument in reference to the suppression of the evidence in connection with that statute cannot stand.

That Section reads:

No taxpayer shall be subjected to unnecessary (34) examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

From a reading of the legislative history of that Section and cases construing it, I cannot hold that the office audit of the 1958 and 1959 returns was an inspection of the taxpayer's records of the type contemplated by Section 7605 (b). The legislative history indicates that the evil to be corrected by its enactment was the harassment of taxpayers caused by repeated visits of Revenue Agents, the interference caused by numerous examinations of taxpayers personal or business records, and things like that.

For a summary of the legislative history, I refer you to De Masters versus Arend, 313 F. 2d 79, which is a Ninth Circuit case, decided in 1963, and more particularly pages 85 to 88.

I need not go into the language that appears on those pages, but there are references to various remarks of Congressmen and Senators in connection with the Section, and it certainly would appear that it is directed at an examination, what is called a field audit of the books and records, and not merely an office audit of the tax returns, and nothing (35) more, which was the case which occurred in reference to this case.

Of course, there is testimony in this case as to — that the Internal Revenue Service thought that a reopening letter was needed in this instance, although it is not completely clear just what the view of the Service is.

However, even if the Service has indicated that its Agents are to send reopening letters in situations such as this, that practice is not a statutory requirement. Were the statute less clear, the administrative practice would be accepted by this Court as indicating the proper construction. The statute, however, is sufficiently clear to indicate that the cursory check made in the 1958 and 1959 returns of Mr. Mancuso was not an examination or examinations of the type discussed in Section 7605 (b).

Nor does Section 7605 (b)'s restriction on unnecessary investigations help taxpayer in this case. As stated in Arend, which I have cited before, at page 87:

An investigation cannot be said to be, quote, unnecessary, end quote, if it may contribute to the accomplishment of any of the purposes for which the Commissioner is authorized by statute to make inquiry. The legislative history, though sparse, tends to confirm the impression that Congress was primarily concerned with protecting taxpayers from examinations which were (36) unnecessary in the sense that they followed prior investigations of the same matter which had established that there was no basis for liability.

The subjects of the office audit and the later investigation were quite different. The office audits consisted only of a mathematical checking or comparison of figures, while the later investigation was concerned with a thorough examination of taxpayer's affairs.

So, therefore, I deny the motion to suppress the evidence obtained, as counsel has put it, in violation of 7605 (b).

Now, directing attention to the next contention of the taxpayer, namely, that there has been a violation of the Sixth Amendment, particularly, that the taxpayer Defendant in this instance has been deprived of effective representation, I find — the Court also finds against the Petitioner on this point.

There is no indication that Petitioner requested counsel during any of his interviews with the Revenue Agents; it follows, then, that there was no denial of a request for counsel.

Although he did not request counsel, Petitioner had established that he was not advised explicitly of his right to counsel until quite late in the investigation.

Now, I am directing my attention then again to the (37) suppression of the evidence in accordance with the interviews.

He had, however, been present at conferences between Revenue Agents and his brother, who was his partner, at which his brother was represented by counsel.

Further, his accountant had been present at an earlier interview with taxpayer, as well as present at interviews with his brother, although a power of attorney had not been filed by the accountant.

Thus, I find it difficult to believe that Petitioner was unaware of his right to counsel.

Even so, this Circuit has not ruled on whether and when one must be advised of his right to counsel, but has applied Escobedo only where a request has been made and that request has been denied.

How the Circuit will rule later on is anybody's guess, but Mrs. Ross, I must correct the first part of this in saying that I am directing my attention when I made the foregoing remarks to the Petitioner's contention that counsel was not present at the taxpayer's interview with the Agents which occurred in June and December, 1961, which he has urged also as a reason for suppression of the evidence obtained as a result of those interviews, and I am denying the motion to suppress in reference to that claim.

Now, the Sixth Amendment, and I make that finding and, of course, I cite in that connection the Davis case (38) which is out of this Circuit, I don't feel it is the same thing as an Escobedo situation, the facts themselves.

Now, I turn to Petitioner's claims relating to the taking and copying of certain papers prepared by taxpayer's accountant.

And I must treat this motion as a motion to dismiss and I think counsel for the Defendant taxpayer has agreed that the Court should treat it in that manner.

The Court must state that it is unimpressed with the Government's apparent view that its actions were entirely proper. Particularly distressing is the Government's statement on page three of its brief that, with the possible exception of net worth statements, quote, the Government obtained from Mr. Duke only what it would have obtained by compulsory process.

I must say that this — of course, this argument would, if sustained, excuse even a forcible entry into a taxpayer's place of business and a taking of his books and records, which are subject to compulsory process, and I think Mr. Ramsey is quite correct that the process would not even have been available to the Government at this particular posture of the case.

Obviously, the availability of a legal means to secure evidence or information does not excuse the use of an illegal means to secure that same evidence, even if it were (39) not true that compulsory process could not be used during the period which we have under surveillance here, namely, the period from the indictment to the trial.

Suffice it to say that had the facts made known at these hearings been presented after conviction instead of before trial, this Court would have granted a new trial.

Now, the papers were copied, as appears from pages twelve and thirteen of the Government's brief, after Mr. Osborn had, quote, requested, end quote, Mr. Duke to permit the copying. Thus, the situation is somewhat different than in those cases where a private citizen, on his own initiative, makes certain evidence available to the Government.

For this reason, and because of the distaste the Court feels for the copying of the papers prepared for Mr. Ramsey, the net worth statements and all related papers, whether incriminatory or not, prepared by Mr. Duke at the direction of Mr. Ramsey and for Mr. Ramsey's use in the defense of Graziano Mancuso are ordered suppressed, as is any evidence that might have been revealed by those papers. All papers involved shall be turned over to the Defendant.

The Court, of course, treats Defendant's motion to suppress as, in the alternative, a motion to dismiss the indictment. After carefully considering the memoranda prepared by counsel and the facts and arguments advanced at the hearings, the Court concludes that, in spite of the (40) Government's wrongful conduct, it need not follow that

the indictment should be dismissed. There is no reason to visit such a drastic penalty upon the public, and I quote from the recent case, the very recent case of the United States versus Ferguson, 243 F. Supp. 237, 238, a District of Columbia case decided in 1965.

I will accept Defendant's argument that where, at the accused's trial, there has been a possibility of prejudice resulting from a possible denial of a fundamental Constitutional right, a new trial, at which the prior defects are to be corrected, must be awarded to the convicted Defendant. I also agree that when it appears that the denial of the accused's rights has been so fundamental that a retrial would necessarily be unfair to the accused, the accused must go free. The usual remedy to protect those convicted in proceedings at which rights have been violated is a new trial free of the original defect; seldom is the convicted accused summarily freed.

For example, in Caldwell versus United States, 205 F. 2d 879, D.C. Circuit, 1953, one who had been present at conferences between the accused and his counsel, and who had been made aware of much of the strategy to be used by the defense, reported all that he had learned to Government prosecutors. The accused was convicted at trial. The Court, finding that the accused had been denied the effective (41) assistance of counsel, felt that a new trial was the proper remedy and that a motion for a judgment of acquittal had been properly denied in the absence of a showing of prejudice to the defense of such a nature as would necessarily render a subsequent trial unfair to the accused.

This Court feels that in order to free this accused before trial, thereby denying the public its day in court, there must be a reasonable likelihood that the assistance of counsel cannot be effective and that the trial would necessarily be unfair. While it was most definitely an error in judgment for the Government to have copied the documents in question, I find no reasonable likelihood of actual prejudice if the trial is allowed to go forth.

The copies of the documents are to be turned over to defense counsel. The Government is instructed not to use at the trial any information it may have obtained from the documents. Defense counsel, of course, has the opportunity at trial to object to the introduction of any evidence he feels the Government obtained from the documents. In this way, the Court feels that no reasonable likelihood of prejudice will result from the Government's wrongful taking of the documents.

The motion to dismiss the indictment must, therefore, be denied at this juncture.

I say denied without prejudice for Mr. Ramsey to (42) show at the trial that there has been actual prejudice and to renew his motion both for a — I mean, a motion to dismiss or a judgment of acquittal, as he may see fit, and make his record as he goes along.

As previously indicated, the Court is not pleased with the Government's obtaining and copying the net worth and other documents prepared by Mr. Duke for defense counsel.

Therefore, in fairness to all, and as the Court's method of indicating disapproval of the Government's action, the Court treats Defendant's motion for the suppression and the motion for dismissal of the indictment as also a motion for the production of the Government's net worth statements, and grants that motion.

The Court does not comment on the fact that in some Districts the Government is required, as a matter of course, to produce its net worth statements for the Defendant, but only states that in this case the Government statements will be made available to defense counsel, and the case will be set down for trial, and I also will grant Mr. Ramsey a continuance to get a new accountant, and I am now asking how much time he thinks he will need to get and locate a new accountant, or whatever he needs for trial?

(Mr. Ramsey) I would like to give the Court as short a period as possible and at the same time try to be reasonable in allowing for it. I should think I would need (43)

sixty days, your Honor, and I would, frankly, like to be certain that the Court would understand if I came back and asked for another thirty, if the accountant indicated he needed additional times, I would think in terms of first locating him, then conferences, and then the reviews, but being realistic, sixty days, and I would anticipate I might have it by sixty, in which event, the Court could set the case for trial, I might ask for an additional thirty, but I hope not.

(The Court) Now, is that agreeable to the Government?

(Mr. Osborn) Yes, your Honor.

Your Honor, before it slips my mind, I think it might be important to make the papers that were turned over by Mr. Duke and have now been turned over to the Court, to make those the Court's exhibits, I believe Mr. Ramsey has other copies of the same documents.

(The Court) I have two copies here. Now, one copy — are these all the papers you have?

(Mr. Osborn) They are absolutely all the papers we obtained from Mr. Duke, your Honor.

(The Court) Now, one copy, as was brought out the last time, has notations on it that the Government has made.

(Mr. Ramsey) Yes, Your Honor.

(The Court) I think you saw those.

(44) (Mr. Ramsey) I looked at them while the witness was on the stand, yes, sir.

(The Court) What do you wish to do with these?

(Mr. Ramsey) Do you wish them made a sealed exhibit, Mr. Osborn?

(Mr. Osborn) I see no point in sealing them, but I think they should be the Court's exhibit rather than returned to you.

(Mr. Ramsey) Why not if I already have them?

(Mr. Osborn) Well, don't you feel they should be part of the record in the case?

(Mr. Ramsey) I feel they should, part of the record in the case, and I don't distrust you or Mr. Kenney or Mr. Crocker, but I don't want them—

(Mr. Osborn) Oh, I misunderstood, they should be sealed.

(The Court) The best way is to give them back to you, because I don't think they ought to be anywhere around here.

(Mr. Osborn) Then will they be part of the record if it goes on appeal?

(Mr. Kenney) If it goes on appeal, Your Honor, your Honor's action on the motions might be reviewed. I think the record ought to be complete and they should be marked as a Government's exhibit and sealed.

(45) (Mr. Ramsey) Mr. Kenney, as a matter of agreement, I would like to have at least one set of what was worked over for my file and, your Honor, I will return intact the various documents which are there and we can mark them as an agreed exhibit.

(Mr. Kenney) Fine.

(The Court) I am now handing, let the record show, to Mr. Ramsey and Mr. Ramsey will return them sealed as an exhibit.

Now, do you want to mark them now, Mr. Clerk?

(The Clerk) No, sir.

(Mr. Ramsey) They will be returned intact, your Honor, I will make one xerox copy of each and return the entire group to the Clerk, or the Court's chambers, whichever.

(The Court) Let the record show, along with the Government's memorandum, this Court received copies of Government's net worth statements, there were two copies, one that was made in June, I think, one net worth state-

ment made in June, the other one marked, that was made fairly recently, I don't know how recently.

(Mr. Osborn) Within the month of September it was completed, your Honor.

(The Court) Was it completed after the interview with—

(Mr. Osborn) I believe it was completed shortly (46) after the interview with Duke, but that interview and what flowed from it had nothing to do with any of the revisions on that statement, I would like to clarify that with Mr. Levitas who was primarily responsible for that net worth statement.

About when did you complete that, Mr. Levitas?

(Mr. Levitas) In September after a bank gave me a revised figure.

(Mr. Osborn) Was it before or after the discussion with Mr. Duke?

(Mr. Levitas) I believe it would be after.

(Mr. Ramsey) Let me follow that up, was it the result of looking at our net worth statement that you got your revised figure from the bank, Mr. Levitas?

(Mr. Levitas) No, sir.

(Mr. Osborn) Would you tell the Court briefly the nature of revisions?

(Mr. Levitas) It was the prior criminal year, the bank gave us a figure and later they came up with the actual exhibit which was different from the figure they gave us verbally, or rather, in a statement, that was not during the criminal years.

(Mr. Osborn) And that will be seen by comparison, your Honor.

(The Court) I have directed the Government to turn over its (47) net worth statements to Mr. Ramsey. Do you wish me to turn over these copies that I have? I have

marked on here that I have opened this statement on the 15th of October, 12:35 p.m., and sealed at 2:25 p.m..

(Mr. Osborn) Perhaps that should be retained, your Honor, as an exhibit, we could make additional copies for Mr. Ramsey.

(The Court) Well, then both statements must be turned over to Mr. Ramsey.

(Mr. Ramsey) That's perfectly agreeable, your Honor.

(The Court) The earlier and the other.

(Mr. Osborn) The Government will certainly comply with that, your Honor.

(The Court) Now, I think I have ruled on everything.

I have treated Mr. Ramsey's motion as a motion to suppress and denied his motion to suppress in reference to the papers and information, and all evidence which might have resulted from the interviews in question, and that I have denied both on the grounds that it was not in violation of 7605 (b) and on the ground that it did not violate the Sixth Amendment in connection with counsel being present at the interviews.

I then treated the motion of Mr. Ramsey as a motion to dismiss the indictment and denied that, feeling that there (48) has not been exhibited to the Court at this time actual prejudice, which I think is necessary under the circumstances.

In that connection, I have stated and restate again that this is without prejudice for Mr. Ramsey to make such motions as he feels are proper and necessary as the case goes along, and also for him to indicate what evidence, if it does come in, what evidence he considers is prejudicial and obtained as a result of the Government's going through the files of Duke and any information they might have gotten from Duke on Mr. Ramsey's defense of the case.

I have likewise treated the motion as a motion to produce and because of the situation obtaining here, namely, the Government having gotten certain papers, work products

of Mr. Ramsey, and because of that only, and not as a precedent in reference to these types of cases, I have ordered the Government to produce all net worth statements which they have in reference to Graziano Mancuso.

Furthermore, at the request of Mr. Ramsay I have postponed this case for sixty days and the Government has acceded to that, and if Mr. Ramsey finds himself in embarrassing circumstances, he may ask for addition time up to thirty days.

I, therefore, feel that under the circumstances he can get along with that time, and that's it, and I think that covers the whole matter which we have before us, does it (49) not?

(Mr. Kenney) I believe so, your Honor.

(Mr. Ramsey) I believe so, your Honor.

(The Court) Mr. Graham, you will take this particular paper and file it as an exhibit in these hearings.

(The Clerk) I will just list it as part of the exhibits of today and put it in the envelope.

(The Court) Gentlemen, in conformance with the opinion I have announced from the bench, will you please draw an order, Mr. Osborn, and submit it for signature, show it to Mr. Ramsey, let him mark it seen, and then present it to the Court.

(Mr. Ramsey) Thank you, sir.

APPENDIX D

CONSTITUTIONAL PROVISION, STATUTES, RULES OF COURT, AND REGULATIONS

Constitutional Provision

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Statutes

Section 7201 of the Internal Revenue Code of 1954, 68 A. Stat. 851 (1954), 26 U.S. Code Sec. 7201, provides as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Section 7608(b) of the Internal Revenue Code of 1954, 76 Stat. 1143 (1962), 26 U.S. Code Sec. 7608(b), provides as follows:

> "(b) *Enforcement of laws relating to internal revenue other than subtitle E.*—
>
> "(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary of his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible

is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

"(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

"(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summons issued under authority of the United States;

"(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable ground to believe that the person to be arrested has committed or is committing any such felony; and

"(C) to make seizures of property subject to forfeiture under the internal revenue laws."

Rules of Court

Rule 16(c) of the Federal Rules of Criminal Procedure, dealing with the scope of pre-trial discovery by the Government, provides as follows:

"(c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case,

or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys."

Rule 41(e) of the Federal Rules of Criminal Procedure, dealing with motions to suppress evidence, provides in pertinent part as follows:

"(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which property was seized for the return of the property and to suppress for use as evidence anything so obtained * * *."

Regulations

Organization of the Internal Revenue Service, 30 Fed. Reg. 9368, 9399-9400, published July 28, 1965 [reprinted unofficially in 9 MERTENS LAW OF FEDERAL INCOME TAXATION §49.76 (1965)] provides as follows:

"1118.6 *Intelligence Division.* The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering, and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases."